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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 03-292	
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		First Named Inventor Leistra et al.	
		Art Unit 1792	Examiner Tsoy, Elena
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p>			
<p>I am the</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96) <input checked="" type="checkbox"/> attorney or agent of record. Registration number 34,309 </div> <div style="width: 50%;"> /george a. coury/ _____ Signature George A. Coury _____ Typed or printed name 203-777-6628, x113 _____ Telephone number October 29, 2008 _____ Date </div> </div> <div style="margin-top: 10px;"> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____ </div>			
<p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>			

<input type="checkbox"/> *Total of _____ forms are submitted.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 10/698,659 Confirmation No. 4437
Applicant : James A. Leistra
Filed : 10/31/2003
TC/A.U. : 1762
Examiner : Elena Tsoy
Docket No.: 03-292
Cust. No. : 34704

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313

REASONS FOR PRE-APPEAL BRIEF CONFERENCE REQUEST

Dear Sir:

This paper is submitted accompanying a Notice of Appeal and a Request for Pre-Appeal Brief Conference.

The Final Office Action of July 29, 2008, from which appeal has been taken, rejects the claims of the application as obvious over each of (1) Wessel et al., (2) Asukabe et al. in view of Wessel et al., and (3) Menjak et al, in each case combined with US 6,685,806 to Cadaval Fernandez De Leceta et al (hereafter "Cadaval").

Each of these rejections relies upon the Cadaval reference, which has been significantly misinterpreted by the Examiner, and even with this misinterpretation, the combination clearly fails to even remotely teach a critical limitation in the claims. Review of this rejection before forcing the applicant to file an Appeal Brief is appropriate and respectfully requested.

Each of claims 1 and 25 clearly calls for an electrode, a membrane between the electrodes, and a layer between the membrane and at least one of the electrodes. The claim calls for the layer to be a peroxide decomposition layer, specifically calls for the positive method step of depositing that layer, calls for that layer to have different properties from the electrode in terms of porosity, and for the layer to have a porosity of less than or equal to 20%. This limitation is totally absent from the art of record.

The Examiner relies upon Cadaval for this teaching, and cited the Abstract and column 6, lines 50-67 in support.

These portions of Cadaval are reprinted below for ease of reference. The Abstract is as follows:

Membrane-electrode assembly consisting of a cationic exchange membrane which contains fluorine (made of hydrolyzed copolymer of tetrafluoro-ethylene and vinyl ether which contains perfluorosulfur with PE-900-1300) and porous layers of electrode material (made of electrocatalyst), inactive electroconductor material and fluoropolymer agglutinating material arranged on both surfaces of the cationic exchange membrane. The cationic exchange membrane which contains the fluorine is made of hydrolyzed copolymer of tetrafluoroethylene with vinyl ether which contains perfluorosulfur, having a crystallinity grade between 2 and 8%; porous layers of the electrode material are obtained which have a porosity comprised between 40 and 70% and decreasing in the direction of the cationic exchange membrane surface with a porosity gradient from 5 to 15% par 1μ . Said membrane-electrode assembly is used in fuel cells, in water electrolysis and in other electrochemical process.

Clearly, the teaching here is of a porosity between 40 and 70%, with a gradient (or rate of change) between these limits of between 5 and 15% per 1μ . Equally clearly, this does not at all teach a porosity of less than or equal to 20% as called for in the present claims.

Column 6, lines 50-67 are as follows:

50 Formation of the layer with porosity that decreases in the
direction of cation-exchange membrane with a porosity
gradient of 5-15% per 1 μ p improves the electrochemical
characteristics of MEA. Such porosity is achieved when the
55 layers of an electrode material are applied to the membrane
surface containing fluorcontaining binder dissolved in a
mixture of organic solvents with different boiling points
(preferably as a 1-5% solution). The binder is a fluoro-
polymer which is identical to the fluoropolymer from
60 which the membrane is made. Such combination of the
fluoropolymer with the mixture of solvents, together with
removal of the solvents during a multistage increase of the
temperature from 20-35° C. to 80-100° C., provides the
65 necessary porosity gradient, with general porosity preferably
40-70%, without the need to use any special methods to
obtain it.

It is equally clear that this teaching is consistent with the
Abstract, and that nothing whatsoever is taught about a porosity of
less than or equal to 20%.

The above argument was made in a Request for Reconsideration
filed on April 8, 2008. The Examiner responded in the instant Final
Rejection (July 29, 2008) stating the following:

The Examiner respectfully disagrees with this argument. The '806 teaches that formation
of the layer with porosity that decreases in the direction of cation-exchange membrane with a
porosity gradient of 5-15% per 1 μ p improves the electrochemical characteristics of MEA (See
column 6, lines 50-55, wherein *general* porosity preferably 40-70% (See column 6, lines 64-
66). In other words, the porosity gradient improves the electrochemical characteristics of MEA at
general porosity outside preferred range of 40-70%. Therefore, in contrast to Applicants
argument, obviously porosity gradient would improve at any reasonable porosity of the electrode
including claimed porosity of 20 % or less.

Where exactly the Examiner arrives at some teaching "outside the preferred range of 40-70%" is not explained. No reasoning is provided as to the underlined conclusion, and it is submitted that there is no reasoning which would support such a conclusion. The reference teaches upper and lower limits significantly different from the claimed porosity, and teaches only as to what is desired between these limits. The Examiner has clearly failed to set forth a *prima facie* case for obviousness, and the Applicant should not be burdened with the cost of an Appeal Brief in order to respond.

It is also worthy of note that the issues with respect to Wessel and the other art of record remain, and will be pursued in an appeal brief if necessary.

This paper is accompanied by a Notice of Appeal and Request for Pre-Appeal Brief Conference, along with authorization of the fee for appeal and an extension of time. It is believed that no other fee is due. If any additional fee is due, please charge same to deposit account 02-0184.

Respectfully submitted,

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October 29, 2008